Case No. 31-RD-1555

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

Good Samaritan Hospital

Employer

and

Allen V. Smith, an Individual

Petitioner

and

Service Employees International Union, United Healthcare Workers-West Union

Marta M. Fernandez and Barbra Arnold, Attys.,
(Jeffer, Mangels, Butler & Marmaro, LLP),
Los Angeles, CA, for the Employer.
Allen V. Smith, Carson, CA, for the Petitioner.
Bruce A. Harland, Atty. (Weinberg, Roger & Rosenfeld)
Alameda, CA for the Union.

ADMINISTRATIVE LAW JUDGE REPORT AND RECOMMENDATIONS ON OBJECTIONS

LANA PARKE, Administrative Law Judge. On August 7, 2006, the Petitioner filed a petition for election (the Petition) with the Regional Director of Region 31 (the Regional Director) of the National Labor Relations Board (the Board) among certain non-professional employees, including technical and service and maintenance employees, employed by Good Samaritan Hospital (the Employer or the Hospital). Thereafter, pursuant to a Stipulated Election Agreement, an election was conducted under the direction and supervision of the Regional Director on March 27-28, 2007 (the 2007 election) in the following unit:

All full-time and regular part-time and per diem non-professional employees, including technical and service and maintenance employees employed by the Employer at its facilities located at 637 South Lucas Avenue, 1225 Wilshire Boulevard, 1245 Wilshire Boulevard, 1350 Shatto Street, and 1254 West 6th Street, all within the city of Los Angeles, California.

The resulting Tally of Ballots served upon the parties following the 2007 election disclosed that a majority of the unit employees had voted for the Union. On April 4, 2007, the Employer and the Petitioner filed timely objections to conduct affecting the results of the election. On November 30, 2007, Administrative Law Judge, Gregory Z. Meyerson issued Administrative Law Judge's Report and Recommendations on Objections to Conduct Affecting the Results of the Election, concluding that the Union had engaged in objectionable conduct

affecting the results of the 2007 election and recommending the election be set aside and a second election be directed. On February 29, 2008,¹ the Board issued a Decision and Direction of Second Election.

Pursuant to the Board's Decision and Direction of Second Election, the Regional Director conducted a second election by secret ballot on April 29-30 (the Second Election), the ballots of which were impounded pending resolution of unfair labor practice charges. ² On November 21, the impounded ballots were opened and counted. The resulting Tally of Ballots showed that of approximately 442 eligible voters, 394 cast ballots, of which 209 were cast in favor of the Union, 180 were cast against the Union, and 5 ballots were challenged.

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On November 26, the Employer filed timely objections to conduct affecting the results of the election. On January 30, 2009, the Regional Director issued a Second Report on Objections, Order Directing Hearing, and Notice of Hearing setting the Petitioner's objections 1 through 11 for hearing, which hearing was held before me on March 2-4, 2009 in Los Angeles, California. At the hearing, counsel for the Employer stated that the Employer would not submit testimony regarding objections 1, 2, 4, 5, 6, 7, 8, and 9. The Employer presented testimony in support of the remaining objections 3, 10, and 11. Only those objections for which evidence was presented are considered herein.³

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Employer and the Union, I make the following findings of fact and legal conclusions:⁴

Findings of Fact and Discussion

I. Legal Principles

The critical period during which the Board generally considers objectionable representation-election conduct (the critical period) "commences at the filing of the representation petition and extends through the election." *E.C. Electric, Inc.*, 344 NLRB 1200, fn 6 (2005). In representation proceedings where, as here, no unfair labor practice allegation or finding exists, a party seeking to have a Board-supervised election set aside because of objectionable conduct during the critical period carries a heavy burden of proof. The objecting party must show the conduct in question had a reasonable tendency to interfere with the employees' free and uncoerced choice in the election. *Quest International*, 338 NLRB 856, 857 (2003). In determining whether the conduct has "the tendency to interfere with the employees' freedom of choice," the Board applies an objective standard and considers nine factors: (1) The number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of

¹ All dates hereafter are 2008 unless otherwise indicated.

² All blocking unfair labor practice charges were thereafter investigated and closed.

³ In its post-hearing brief, the Employer implicitly asserts that by "delaying the election through legal maneuvers" the Union engaged in objectionable conduct. No objection reflects such an allegation, and I do not address it herein.

⁴ Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony.

misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. See *Cedars-Sinai Medical Center*, 342 NLRB 596, 597 (2004), citing *Taylor Wharton Division Hrasco Corporation*, 336 NLRB 157, 158 (2001), et al.; *Avis Rent-a-Car*, 280 NLRB 580, 581 (1986).⁵

II. Objections

A. Objection 3

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During the Critical Period, the union attempted to bribe and coerce employees into voting for the Union by mailing checks in varying amounts to employees' homes. The Union's conduct of attempting to bribe employees also constitutes an unfair labor practice. A union's offer of benefits to potential members during an election campaign is objectionable and is grounds for setting aside an election. *Alyeska Pipeline Service Co.*, 261 NLRB 125 (1982).

1. Facts

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The Union has represented about 440-460 unit employees at the Hospital since 2000. During the term of the 2003-2006 collective bargaining agreement between the Employer and the Union, a dispute arose regarding calculation of union dues deducted from the paychecks of certain employees.⁶ On June 9, 2006, the Union filed a class-action grievance (class-action grievance) against the Employer complaining that the Employer had overdeducted dues from union members and requesting immediate reimbursement upon identification of amounts due.

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In the course of negotiating a successor contract to the 2003-2006 collective bargaining agreement, the Union and the Employer, on November 2, 2007, executed a Letter of Agreement Regarding Grievances and unfair Labor Practice Charges, which reads in pertinent part:

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Upon ratification of the Agreement [the Union] agrees to withdraw the outstanding class action grievance...subject to good faith efforts to resolve the payroll systems/calculations of union dues for the term 2003-2006 of the Agreement.

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On November 12, 2007, the Union withdrew the class-action grievance. The Union and the Employer continued to discuss dues refund calculations, resulting in exchanges of emails that included, in pertinent part, the following:

Email A: Sent February 21

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From: Tere Omnes (Ms. Omnes), Director, Union Membership Department To: Diana Scribner (Ms. Scribner), Director, Employer's Human Resources Please take the following action at this time:

1. Implement the 72-hr cap for 12-hour employees per your suggestion.

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⁵ The Employer alleges the conduct described in Objection No 3 is a violation of the Act as well as objectionable. While conduct unlawful under the Act is "a fortiori, conduct which interferes with the results of an election" *Airstream, Inc.*, 304 NLRB 151, 152 (1991), no unfair labor practice issue is before me in this case, and I make no finding as to the unlawfulness of any alleged union conduct. Rather, where appropriate, I apply the *Taylor Wharton* analysis.

⁶ The basis for the dispute is not material to the issues herein.

- 2. Once the programming change has gone into effect, prepare and send to me a spreadsheet that shows the employees who have had dues deducted on overtime, along with the refund amounts due each, broken down by pay period. Once we have reviewed the calculations and determined what refund amounts have already been issued to individuals by [the Union], we will provide that information to you so that [the Employer] can issue refunds due affected workers.
- 3. Draft a letter to the affected members explaining the problem and resolution. Email the draft...for review before you send it to our members...
- 10 Email B:

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Sent February 27

From: Ms. Scribner To: Ms. Omnes

Ms. Omnes, this process has taken close to two years to complete. Thank you for seeing that it could have been resolved long ago... As for refunds, we have had this discussion before. The union has received all dues monies deducted, therefore, you can refund. The hospital will not refund what we had thought was following [the Union's] dues information/letters/directives.

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Sent February 29, 2:24 p.m.

From: Rieko Yamazaki (Ms. Yamazaki), union Membership Associate at the time To: Ms. Scribner

Looks like a solution has been reached, which is great news, so I can more forward with calculating refunds for all members who had paid dues on their [overtime]. In order to calculate the refund for these members I do need to see the hours they had worked and what they ended up paying in dues. Can you please send me a report with this breakdown?

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Sent February 29, 2:36 p.m.

From: Ms. Scribner To: Ms. Yamazaki

Thank you Rieko...We will go back and look at all the extra twelve hour shifts member employees had worked.

Email E:

Sent February 29, 3:10 p.m.

From: Ms. Yamazaki

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You're welcome Diana, let me know if you need anything from me and about when the report will be ready.

Email F:

45 Sent February 29, 3:10 p.m.

From: Ms. Scribner
To: Ms. Yamazaki
I sure will.

• Email G:

Sent March 18

From: Ms. Yamazaki

To: Ms. Scribner

I am following up on the status of the report I had requested on 02/29/08. Please let me know what the status is for this.

Email H:

Sent March 24

From: Ms. Scribner To: Ms. Yamazaki

...The overpayment calculation report is not done yet...I will find out how much longer.

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Email I:

Sent March 28

From: Ms. Yamazaki

To: Ms. Scribner

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Have you received a response from [Bessie Mandap] in regards to how long this report will take to put together?...This is a pressing matter that the rep Kevin needs to be kept up to date on.

At some point prior to April 10, rumors circulated among unit employees that union-dues overdeductions would be refunded.⁷ On April 10, without prior or post notification to the Employer, the Union issued checks in varying amounts (\$1.19 to \$849.30) to 126 employees. Check invoices (or stubs) attached to the checks noted "72H Rfnd." Shortly after the Union issued the checks, some employees told hospital management they had received checks from the Union. On April 18, Ms. Scribner told Kevin Monk (Mr. Monk), union representative, that employees who received refund checks did not know what they were for. Mr. Monk said it was out of his hands. About twenty employees also asked Mr. Monk what the checks were for, and some employees complained to Mr. Monk that they had received no or insufficient refunds. In response, the Union supplied employees with "Dues Refund Correction Forms" on which they could specify their disagreement with their refund checks and issued a memorandum dated
 April 19 (the April 19 letter) to bargaining unit employees, which read:

Re: Dues Refund Checks

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Recently, many of you received a check from UHW for a refund of your Union dues. The check reflected the excess amount that Good Samaritan Hospital deducted from your pay. Many times employers will purposely overcharge Union dues as a way to turn employees against the Union. In other cases, it is just an

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⁷ Employee witnesses presented by the Employer, Daissie Rubiano, Miguel Illa, Jr., Ed Ignacio, and Ligda Alegria, testified they heard such rumors prior to receipt of the union checks. When a coworker told Ligda Alegria and other employees that they were going to receive checks from the Union, she telephoned Kevin Monk (Mr. Monk), union representative, who said the Hospital had taken more union dues than they were supposed to, and the Union was going through records to see who was entitled to a refund. Mr. Monk said that employees would have to wait two to three weeks for a refund.

⁸ It is reasonable to expect that employees understood the invoice notation to mean "72-hour refund." Employee witness Marius Villalon testified that he thought he received only the check itself without an accompanying check invoice/stub. Even accepting this somewhat implausible testimony, I cannot draw any inference from it that the Union issued any appreciable number of checks without an explanatory invoice.

administrative error by the employer. We do not know why Good Samaritan Hospital overcharged you for Union dues.

As soon as we became aware of the hospital's error, we attempted to work with them to correct the error and refund the proper amount to each employee. Managers at Good Samaritan Hospital were not overly cooperative in this endeavor. In fact we are still awaiting information we requested from them to calculate the refunds. As a result, the refund took longer than was necessary.

Now the Good Sam is trying to blame their mistake on the Union. That is ridiculous and shameful! Remember, with a Union there is a process to address errors and mistakes made by the hospital. Without a Union, there is no process and you have to live with Good Samaritan Hospital's mistakes. That is what is at risk in this election. I urge you to VOTE YES.⁹

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Employee witnesses Daissie Rubiano and Marius Villalon testified they thought the explanation in the April 19 letter coupled with the unexplained union checks they received constituted an attempt to bribe them to vote for the Union. Employee witness Miguel Illa Jr. testified that the Union's April 19 exhortation to vote for the Union "got" him, but his opinion was not going to be changed by someone telling him how to vote.

Even after the Union issued the refund checks, and as the Union dealt with employee questions and complaints about the checks, the Employer and the Union continued to exchange emails concerning the refund formula:

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Email J:

Sent April 16

From: Ms. Scribner To: Ms. Yamazaki

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...I had missed a whole week due to illness and am catching up. I contacted Bessie in payroll to see if our Information Systems person is still compiling the data you need for the refund checks. I apologize for the delay. First Charito from IS is out, then me. It is a huge project but worth it. Thank you. I will get a date for you.

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Email K:

Sent April 25

From: Ms. Scribner To: Ms. Yamazaki

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...we have finally completed the compiling of all pay periods from May 16, 2004 to March 1, 2008 on all employees...Using the recently approved formula, we applied this formula to those that have worked excess 12 hour shifts. Please review and should you need further clarification, let me know.

To Email K, the Employer attached 111 pages of employment and payroll information relative to dues-overdeductions, along with a much shorter summary calculation of each unit employee's dues-overdeduction (Employer Overdeduction Calculation).

⁹ Although Mr. Monk testified that the Union issued the April 19 letter along with the checks, he was not directly involved in either mailing, and the cumulative weight of credible contradictory evidence shows he was mistaken.

Thereafter, on an unknown date, Ms. Scribner compared the amounts on about eight union refund checks with the Employer Overdeduction Calculation (Post-distribution Comparison). None of the union refund checks matched the amounts arrived at by the Employer Overdeduction Calculation.¹⁰

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2. Discussion

The Union filed a class action grievance concerning dues overdeductions nearly two months before the decertification petition was filed on August 7, 2006, resolution of which required the Union to make dues overdeduction reimbursement to employees. The Employer contends the Union improperly engaged in a subtle form of "vote-buying" and intimidation that interfered with employees' free and uncoerced choice in the election when it distributed dues-refund checks to 126 unit employees on April 10, followed nine days later by a written explanation in which the Union urged a pro-union vote.

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The following undisputed facts underpin the Employer's contention that both the timing and amount of the Union's dues refunds constituted objectionable conduct: (1) the Union distributed the checks before the Employer supplied it with the relevant payroll data the Union had earlier sought, (2) the Employer Overdeduction Calculation showed that 133 unit employees were entitled to dues refunds, (3) the Employer Overdeduction Calculation showed that the total amount of money to be refunded to employees was \$14,168.29 (4) the amount of money that the Union distributed to employees on April 10 was \$27,003.13, (5) in a letter to employees following the dues refunds, the Union blamed the dues overdeduction on the Employer's "error" and accused the Employer of uncooperative delay in providing information necessary for refund calculation, (6) the Union urged employees to vote for the Union in the upcoming election in order to retain a "process" that could address employer mistakes, (7) The Union did not distribute any further refunds after receiving the Employer Overdeduction Calculation.

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It is clear from the email exchange between the Union and the Employer that by February 29 questions as to what employee categories were involved in the dues-refund issue had been resolved, and the Union anxiously awaited payroll information the Employer had agreed to provide and from which the Union intended to calculate overpaid dues. By emails of March 28, the Union pressed the employer for the information, which the Employer did not provide until April 25.

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In the meantime, rumors of impending union-dues overdeduction refunds circulated among unit employees, and on April 10, the Union issued refund checks to 126 unit employees. At the hearing, the Union explained neither the basis for its refund calculations nor its distribution timing. However, it is reasonable to infer that the Union calculated the refunds without benefit of the payroll information it had earlier sought and that the closely approaching decertification election hastened dues-refund distributions. The question is whether the Union's conduct in this regard had a reasonable tendency to interfere with the employees' free and uncoerced choice in the election.

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¹⁰ The Post-distribution Comparison was received into evidence only as to the fact of the comparison and not as to its accuracy.

¹¹ It appears from the email chain set forth above that the Union initially expected the Employer to refund the dues overdeductions. By email of February 27 (Email B), the Employer firmly rejected any such notion, pointing out that the Union had received all deducted dues monies, to which response the Union apparently acceded.

The Employer argues that the Union's distribution of dues-refunds to unit employees during the critical period was an unlawful benefit, citing, inter alia, *Wagner Electric Corp.*, 167 NLRB 532, 533 (1967) (promising and providing life insurance for signing up with the union); *Revco D.S., Inc. (DC) v. NLRB*, 830 F 2d 70, 72 (union offer of money for supporting vote); *General Cable Corp.*, 170 NLRB 1682 (1968) (bestowing gift certificates to induce union support); *NLRB v. Savair MFG. Co.*, 414 U.S. 270 (1993) (preelection initiation fee waiver to union supporters constituted impermissible inducement); *Mailing Services, Inc.*, 293 NLRB 565 (1989) (preelection grant of free medical screenings constituted impermissible inducement).

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In the cases cited by the Employer, the unions involved provided or promised to provide employees with economic benefits in exchange for their support of the union, which conduct is clearly impermissible. 12 The instant situation falls outside the scope of those cases. For nearly two years prior to the decertification election, the Employer and the Union had worked toward resolving the Union's class action grievance concerning overdeducted dues, resulting in a conclusion that certain employees were entitled to refunds of overdeducted dues. That conclusion was reached well before the critical period. The Union may have hoped that its April 10 refund of overdeducted dues would burnish its image in the minds of voters, but the Union did not condition any refund on support for the Union, and there is no evidence the purpose of the refunds was other than to redress the wrongful over-collection of union dues. Reimbursement of overdeducted dues does not confer a monetary benefit on employees or enhance an employee's economic position but rather remedies past misfeasance and avoids possible future liability. Such reimbursement does not constitute a gratuitous, extraneous, and therefore improper, benefit. The Union's refunding of overdeducted union dues was not only permissible, it was obligatory. Permissible and/or obligatory union action is not objectionable election conduct "simply because it is motivated by the union's desire to present itself as a more attractive candidate." See EFCO Corp., 185 NLRB 220, 221 (1970)(union's announced alteration in dues structure permissible although clearly designed to ensure continued support in the forthcoming election).

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The Employer argues, however, that because the reimbursement amounts paid by the Union had no correlation to the reimbursements owed, the refunds were, ipso facto, an unwarranted financial benefit to employees. The fact that prior to April 10 the Union had been waiting for the Employer to furnish it with payroll information from which the Union could formulate refunds, coupled with the fact that the Union did not have the requested payroll information when it issued the refunds, raises a suspicion that the Union may have rushed to

¹² See also *Teamsters Local 776 (Pepsi Cola)*, 305 NLRB 832 (1991)(initiation fee refund to certain unit employees shortly before a decertification election restrained and coerced the employees in considering how to vote); *Mailing Services, Inc.*, 293 NLRB 565 (1989)(preelection announcement of free medical screenings as the "first Union benefit" is objectionable conduct); *Flatbush Manor Care Center*, 287 NLRB 457 (1987)(union payments of money to supplement unit employees' income prior to a representation election gave employees the impression that the payments would continue if the union was selected as their bargaining representative, which restrained and coerced employees in violation of the Act); *Loubella Extendables, Inc.*, 206 NLRB 183 (1973)(union's expressed willingness on eve of election to forgive initiation fee obligation if it won the election, constitutes grant of financial benefit and objectionable union conduct). The policy prohibiting preelection benefits is "rooted in the idea that an employee's vote should be governed only by consideration of the advantages and disadvantages of unionization in his or her work environment, and not by any extraneous inducements of pecuniary value." *NLRB v. L & J Equipment Co.*, 745 F.2d 224, 231(1984).

refund overdeducted dues without having a thorough basis for guaranteeing refund accuracy. The Employer's overdeduction calculations tend to support such a suspicion, as does the absence of evidence as to what information the Union based its refund calculations on. But suspicion is no substitute for proof. The Union has a protected power to regulate its membership affairs and to resolve grievances.¹³ No evidence was presented as to what information the Union considered in arriving at refund beneficiaries or amounts, but the absence of such evidence does not permit an inference that the Union had no rational basis for the refund amounts.¹⁴

Even if I were to find that the Union's refund calculations were ill-founded, it does not follow that the refund distributions justify overturning the election. To justify overturning the election, the Employer must show the refunds had a reasonable tendency to interfere with the employees' free and uncoerced choice in the election, Quest International, supra. Applying the Taylor Wharton factors, I cannot find the Union's refund payments had any reasonable tendency to interfere with employees' election choices. Although the refunds went to more than a quarter of the unit employees fewer than three weeks before the election, there is no evidence the refunds were likely to cause fear among employees or to generate a feeling of moral indebtedness to the Union. A significant number of employees anticipated dues overdeduction reimbursement prior to April 10, and the invoices accompanying the refund checks noted they were refunds. While the Employer may have believed the Union cobbled together the refunds without regard for fiscal accuracy, there is no evidence employees had any reason to suspect that or to draw invidious inferences if they did. Under all the circumstances, it is reasonable to expect that employees must have inferred that in issuing the refund checks the Union sought to restore to employees erroneously deducted dues. While some employees may have ascribed a self-serving or even improper motivation to the Union in abruptly distributing refunds shortly before the election, no evidence and no justifiable inference suggest the refund distribution interfered with employees' free choice in the election. I find that the Union's reimbursement of dues overpayments shortly before the election did not unduly interfere with the free choice of the electorate.

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The Employer further argues that by its April 19 letter, the Union manipulated the announcement of the refunds so as to tie the distributions to the decertification election and "unlawfully tap into the member's sense of 'obligation to the Union' and fear of loss of the Union. The Employer points out that the Union, in explaining the refund checks, (1) falsely suggested that the Employer may purposely have overcharged union dues, (2) warned that without a union "process" to address employer errors, employees might have to live with the Employer's mistakes, and (3) unmistakably tied the refunds to the election by urging employees to vote for the Union in the decertification election.

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Even assuming the Union's April 19 letter to employees who had received dues-overpayment refunds misled employees as to the cause of the dues overpayment, I cannot find it objectionable. The Board declines to set aside elections because of a party's misleading campaign propaganda unless the propaganda involves misuse of the Board's election process or forged documents. *Midland National Life Insurance Co.*, 263 NLRB 127, 131-133 (1982); *Cedars-Sinai Medical Center*, 342 NLRB 596, 606 (2004); *U-Haul Co.*, of Nevada, Inc., 341

¹³ See *EFCO*, supra at 221.

¹⁴ The Employer asserts that the Union "cannot show that it made legitimate dues calculations." The Employer misapplies the pertinent burdens of proof. It is the Employer, as the objecting party, not the Union, that bears the burden of proof.

NLRB 195 (2004). As to warning employees that they face workplace dangers and injustices without a union to protect them and urging them to vote for the Union, such is pure, and fairly mild, campaign rhetoric.¹⁵ Applying the Board's *Midland National Life* standard, I find the language of the Union's April 19 letter unobjectionable. Accordingly, I recommend the Employer's Objection 3 be overruled.

B. Objection 10

During the election, On April 29 and April 30, 2008, in front of the Grace Ford Salvatori Auditorium where bargaining unit members were voting at the time, Union Representatives, including but not limited to Kevin Monk, Letty Marquez, Analisa Alvarez, Karla Villacorta, Lauren Perez Rangel and Samantha Winslow positioned themselves and spoke to employees as they walked past to vote, in violation of the prohibition against electioneering at the polls, and in direct violation of the Board agent, Steve Alduenda's, instruction that the area was a no electioneering zone; a course of conduct calculated to erode support of decertification among unit employees. See *Brinks, Inc,* 331 NLRB 46 (2000); *ITT Auto v. NLRB,* 188 F.3d 375 (6th Cir. 1999).

20 1. Facts

The polls for the Second Election were established in the Hospital's auditorium, which was located in a conference building (auditorium building) and separated from a hospital administration building (administration building) by a wide pavement. Both the auditorium and the administration buildings were situated across a street from a hospital parking structure from which the two buildings could be reached on a pedestrian crosswalk (the pedestrian crosswalk). The administration building entrance directly across from the auditorium was flanked by two large concrete planter boxes set 8-10 feet from the administration building doorway, from which a clear view of the glass doors into the auditorium building could be had. Based on photographs submitted at the hearing, the auditorium itself was comprised of two sets of about ten seating rows separated by a downward sloping aisle about 40-50 feet in length. 16 The election voting booths were set up at the bottom of the auditorium. Access to the voting booths could be gained in two ways: (1) through the auditorium building's outer glass doors, across a small fover, through open double wooden doors into the auditorium, and down the long auditorium aisle facing the glass doors, or (2) via an elevator in the auditorium building that permitted access to the auditorium from the main hospital building. The planter boxes in front of the administration building were visible from the bottom of the auditorium through the auditorium building's glass doors.

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¹⁵ Metropolitan Life Ins. Co., 90 NLRB 935, 938 (1950), cited by the Employer is inapposite. In Metropolitan, an employer's letter to unit employees was "reasonably calculated to impress upon employees the futility of voting for [the union or for one of two competing unions]." The Union's April 19 letter contains no threat, and employees could reasonably be expected to assess the statements therein as campaign propaganda.

¹⁶ Mr. Smith testified that the auditorium aisle was about 200 feet in length from the top of the auditorium to the bottom. The photograph of the auditorium shows only about ten rows of auditorium seating on either side of the aisle, which suggests Mr. Smith's estimation may be excessive. Based on the photograph, an estimation of 40-50 feet is reasonable.

On the afternoon of April 28, the day before the election, the Board agent conducting the election held a preelection conference in the auditorium, which a number of union and employer representatives, including Mr. Monk, Ms. Schuster, and Ms. Scribner, as well as Barbra Arnold (Ms. Arnold), one of the Employer's attorneys, Allen V. Smith (Mr. Smith), the Petitioner, and Cynthia Cabrera (Ms. Cabrera), observer for the Petitioner, attended. Initially the Board agent informed the conferees that during the election, party representatives were restricted from being present at the glass doors into the auditorium building, the foyer, and the auditorium itself. Toward the end of the conference, the Board agent further designated a "non-electioneering" zone outside the auditorium building that was to be observed during the election.

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Testimony varied as to what areas the Board agent specified the nonelectioneering zone encompassed. An amalgam of the credible testimony of Ms. Scribner, Ms. Cabrera, Mr. Smith, and Ms. Arnold establishes that after discussion among the conferees, the Board agent decreed the pavement between the auditorium and administration buildings as well as the pedestrian crosswalk (collectively referred to herein as the Election Zone) were to be free from electioneering during the election.

While the Board agent defined the parameters of the Election Zone, he did not define "electioneering," which led to differing and imprecise understandings of what conduct the Board agent intended to prohibit: Mr. Smith understood electioneering to be conduct like that objected to in the first election, i.e., handing out leaflets in front of the polling place, or speaking to voters and/or wearing paraphernalia or anything that would affect a person's decision. Ms. Arnold, on the other hand, believed the Board agent had emphasized that "union representatives and management employees were not to position themselves" in the Election Zone. To his part, Mr. Monk did not think he was restricted from mere presence in the Election Zone while the polls were open. No evidence shows that the parties ever reached an unambiguous consensus of what the Board agent meant by "electioneering." Consequently, I decline to find that the Board agent restricted the parties from any presence whatsoever in the Election zone. Rather, I find the parties could reasonably infer that the Board agent prohibited active campaign outreach to unit employees in the Election Zone during any polling period.

On each of the following two days, April 29 (election-day one) and 30, the Board conducted three discrete voting sessions in the auditorium: morning, midday, and evening.

On April 29 and 30, Mr. Smith served as an observer at the morning and evening sessions and relieved observers during the afternoon sessions. During the course of the

¹⁷ While Ms. Arnold may have inferred from The Board agent's statements that he intended to prohibit any and all party-representative presence in the Election Zone, her notes of the preelection conference do not justify so restrictive a view. Her notes, in pertinent part, state: "*Electioneering Zone. No electioneering—Distance? Electioneering—Path of travel to Auditorium not appropriate to have electioneering+ right outside [administration building, auditorium building] + path of travel. *Union agrees No electioneering outside. Distance—Steve-Board—area just outside is main area of concern. [Employees] coming from diff[erent] areas to vote.—Sometimes have to pass union reps or supervisors.—Try not to be where [employees] are passing by. Steve—general statement proceed at your own peril if have a representative or supervisor stationed or patrolling to interact or see any [employee] on way to polling area—not soliciting objections, but can file objections if interference."

morning voting session on election-day one, Mr. Smith saw Mr. Monk sitting or leaning on the edge of a concrete planter box in front of the administration building within the Election Zone. Mr. Smith's first sighting was from his seat at the observer table at the bottom of the auditorium aisle facing the auditorium building's glass doorway; his second occurred when he visited the restroom in a hallway off the auditorium foyer. Mr. Smith observed Mr. Monk in that position over a period of about 30 minutes. Mr. Smith called Mr. Monk's presence to the attention of the Board agent, who forbore to speak to Mr. Monk, saying the union representative would "proceed at his own peril."

On election-day one, the first day of the election, at approximately 8:00 a.m., Ms. Arnold passed from the administration building to her vehicle in the parking structure, using the pedestrian crosswalk. For about five minutes, she observed Mr. Monk sitting on the planter nearest the pedestrian crosswalk in the Election Zone.

Employee witness, Luis Ascencio (Mr. Ascencio), testified that on election-day one at approximately 6:15 to 6:45 a.m., he and "a couple" of other employees exited the administration building enroute to the auditorium building to vote in the union election. Mr. Ascencio saw Mr. Monk leaning against one of the planters in the Election Zone, and Mr. Monk nodded to him.¹⁸

Employee witness Maria Deperez testified that on election-day one at about 7:30 a.m., as she exited the auditorium building after voting, she briefly saw Mr. Monk and union representatives Annalisa Alvarez (Ms. Alvarez) and Lauren Perez (Ms. Perez) by the planters in the Election Zone.

Ms. Cabrera testified that during the midday voting session on election-day one, she saw Mr. Monk leaning on the administration building planter in the Election Zone on one occasion. Ms. Cabrera also testified that on the same day, she saw union representative Samantha Winslow (Ms. Winslow) in the Election Zone, pacing back and forth in front of the auditorium building doorway for "a couple of hours" between 11:00 a.m. to 1:00 p.m. Ms. Cabrera said she saw no employees in the Election Zone at times when either Mr. Monk or Ms. Winslow was there. On April 30, Ms. Cabrera filled in as one of the Petitioner's observers for an hour, during which time, she saw union representative Letty Marquez (Ms. Marquez) in the Election Zone standing near the planter nearest the pedestrian crosswalk. For about five minutes on election-day two, Ms. Cabrera also saw Mr. Monk seated on a cement bench in front of the administration building in the Election Zone. During the times that Mr. Monk and Ms. Marquez were there, Ms. Cabrera saw employees coming through the Election Zone to vote. 19

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¹⁸ In an email Mr. Ascencio sent to management at 5:57 p.m. on election-day one, he said Mr. Monk greeted him "with a good morning," and Mr. Ascencio greeted him back. Mr. Ascencio testified, however, that the two merely nodded. I find that while the two men acknowledged each other, they exchanged no words.

¹⁹ I cannot credit Ms. Cabrera's testimony with regard to union representatives' presence in the Election Zone. Not only was it difficult to determine from Ms. Cabrera's testimony what she saw and when she saw it, but her testimony was also implausible and contradictory. She testified that Ms. Winslow paced in front of the auditorium building doors during the mid-day voting session of election-day one, yet she also testified that she saw no employees during her sighting of Ms. Winslow, which is impossible if, as her testimony otherwise suggests, employees voted during that session. Further, no mention of seeing Ms. Marquez was contained in a prehearing statement signed by Ms. Cabrera, which the Employer filed in support of the objections.

Anthony Stewart (Mr. Stewart), the Employer's director of security, testified that at about 11:15 a.m. on election-day one, he saw union representative Karla Villacorta (Ms. Villacorta) in the Election Zone. Later, sometime before 12:30 p.m., Mr. Stewart saw union representatives Ms. Alvarez and Lauren Rangel (Ms. Rangel) in the Election Zone with Ms. Villacorta. Mr. Stewart told Ms. Villacorta the representatives were not allowed to be in that area and asked them to leave. Ms. Villacorta refused. When, about 15 minutes later, Mr. Stewart attempted to photograph them, the union representatives left the Election Zone.²⁰ Although Mr. Stewart saw one of the representatives holding a legal pad and all three with cell phones, he did not see any of them speak to employees.

On election-day one sometime between 7:30 and 8:00 a.m., Wei Lung Lu (Mr. Lu), the Hospital's employment coordinator photographed Mr. Monk sitting on one of the planters in the Election Zone. Mr. Monk remained in that position during the five to ten minutes Mr. Lu spent in the area, during which time Mr. Lu saw about three employees passing through the Election Zone, apparently on their way to vote.²¹

Ms. Pledger served as a union observer during all voting sessions of both election days. Ms. Pledger said that on election-day one she met with Mr. Monk for about 15-20 minutes on the cement bench in the Election Zone prior to the start of the first voting session. On election-day two, Ms. Pledger again met with Mr. Monk before the first voting session. Other than those meetings, during each of the election days, Ms. Pledger only saw Mr. Monk when he came to the auditorium when voting ended.

Mr. Monk initially testified that on election-day one while the polls were open for the morning session, he positioned himself in the Election Zone in front of the administration building for a total of about 15 minutes, first leaning against a planter and later sitting on a cement bench under the administration building's awning. From his position, Mr. Monk could see through the glass doors into the foyer of the auditorium building but could not see into the voting area. In later testimony, Mr. Monk testified that for about 25-30 minutes between about 6:30 to 7:30 a.m. on election-day one, he was

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While Ms. Cabrera said the oversight was an omission, the lapse adds to the dubiety of her testimony.

²⁰ Although Mr. Stewart had sighted Ms. Villacorta in the Election Zone more than an hour before he attempted to photograph her and the other union representatives, there is insufficient evidence to justify an inference that she remained in the Election Zone between Mr. Stewart's sightings. The only reasonable inference I can draw from Mr. Stewart's testimony is that Ms. Villacorta, Ms. Alvarez, and Ms. Rangel were present in the Election Zone on election-day one for about 15 minutes during the midday voting session.

²¹ In its post-hearing brief, the Employer states that Mr. Lu testified he saw Mr. Monk and union representative Samantha Winslow for approximately five to ten minutes shortly after 8:00 a.m. on election-day one. The Employer has misstated Mr. Lu's testimony. Mr. Lu testified that he saw Mr. Monk in the Election Zone sometime between 7:30 and 8:00 a.m. on that day.

present in the Election Zone by the administration building planter. For an unknown part of that time, union representative Ms. Winslow was also present. ²² While he was in the Election Zone, Mr. Monk could see employees entering the auditorium building. ²³

I find it unnecessary, if indeed it were possible, to determine the precise time period during which Mr. Monk was present in the Election Zone on the morning of election-day one. Although a number of witnesses testified to sighting Mr. Monk, of the credible witnesses only two gave a probative estimate of the length of time Mr. Monk spent in the Election Zone: Mr. Smith and Mr. Monk. I found Mr. Smith to be a careful and candid witness. From his seat at the observer table at the bottom of the auditorium aisle, Mr. Smith could see Mr. Monk leaning against a planter in the Election Zone. Off and on, Mr. Smith observed Mr. Monk in that position for about 30 minutes; Mr. Smith's testimony essentially corroborates Mr. Monk's testimony in that regard. Although various witnesses briefly sighted Mr. Monk in the Election Zone at or near the administration building planter during the period of about 6:15 a.m. to shortly after 8:00 a.m., I cannot reasonably infer from the witness testimonies considered as a whole that Mr. Monk was in the Election Zone during the morning voting session for more than 30 minutes.

On the record as a whole, I find, therefore, that the credible evidence establishes only the following regarding what occurred in the Election Zone on election-day one: (1) Mr. Monk met with Ms. Pledger as the Union's observer for 15-20 minutes prior to commencement of the morning voting session; (2) for about 30 minutes during the morning voting session, Mr. Monk was present near the planters of the administration building where he was briefly joined by union representatives Ms. Winslow, Ms. Alvarez, and Ms. Perez; (3) while present in the Election Zone, neither Mr. Monk nor the other union representatives interacted with any employees; (4) at some time during the midday voting session, union representatives Ms. Villacorta, Ms. Alvarez and Ms. Rangel were briefly present in the Election Zone but interacted with no employees.

Following the close of the third voting session on election-day one, the Board agent met with representatives of the Union (including Mr. Monk), the Employer, and the Petitioner in the polling area. Some members of the group asked whether Mr. Monk's presence in the Election Zone during the first voting period of that day was a violation. The Board agent told the group generally that "no one was supposed to be in those areas who may have some sort of influence on the election" and would be there at their own peril. ²⁴

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²² As noted, Mr. Monk's two accounts of the length of time he spent in the Election Zone during the morning voting session of election-day one were inconsistent: the first account claiming only 15 minutes and the second 25-30 minutes. I do not find this inconsistency to affect Mr. Monk's credibility adversely. I did not find Mr. Monk to be evasive; rather he impressed me as trying to testify truthfully within the limitations of his recollection.

²³ There is no evidence as to how many employees traversed Election Zone pathways to the polling area. Employees who accessed the auditorium building via its elevator did not have to enter the Election Zone. Employee Mr. Ascencio, for example, returned to his department after voting by taking the auditorium elevator to a physician parking structure that connected to the main hospital building without passing Mr. Monk.

²⁴ Citing this testimony of the Petitioner, the Employer asserts that the Board agent "admonished Mr. Monk that he was not supposed to be in the area." There is no evidence the Board agent specifically cautioned Mr. Monk, rather the Board agent spoke generally of party representatives being there at their own peril.

2. Discussion

The question here is whether union electioneering occurred that warrants setting aside the election. The answer to that question must be formulated within the guidelines of *Boston Insulated Wire & Cable Co.*,²⁵ in which the Board established several factors bearing on objectionable electioneering, including: (1) the nature and extent of electioneering, (2) whether it was conducted by a party or by employees, (3) whether the conduct occurred in a designated no electioneering area, and (4) whether the conduct contravened the instructions of a Board agent.

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On election-day one Mr. Monk was present in the Election Zone for about 30 minutes during the morning voting session. Union representatives Ms. Winslow, Ms. Alvarez, and Ms. Perez were also there during that time, but there is no evidence they were present for any significant period. Union representatives Ms Villacorta, Ms. Alvarez, and Ms. Rangel were present in the Election Zone during the midday voting session on election-day one for approximately 15 minutes. It is to these union representatives' presence in the Election Zone while voting was taking place that the *Boston Insulated Wire & Cable Co.* factors must be applied.

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Addressing the less complex factors of Boston Insulated Wire factors first, it is clear that factors 2 and 3 are met in this case: during periods when the polls were open, Mr. Monk and the other representatives of the Union were present in the Election Zone, an area designated by the Board agent as a "no electioneering" area. Factors 1 and 4 are not so readily resolved. Factor 1 requires an analysis of the "nature and extent of electioneering" that Mr. Monk and the other representatives allegedly engaged in. Citing Nathan Katz Realty v. NLRB,²⁶ Electric Hose & Rubber Co.,²⁷ and Performance Measurements Co., 28 the Employer argues that a party's mere presence, without explanation, in a no-electioneering zone constitutes objectionable electioneering sufficient to set aside the election. However, the cases cited by the Employer do not establish any such bright-line rule, and the facts of the cases are distinguishable from those of the instant matter. Nathan Katz addressed the conduct of union agents in a designated no-electioneering zone who motioned, honked, and gestured to employees arriving at the polling place to vote, facts at variance with the silent and unobtrusive behavior of the union representatives here. While both Electric Hose and Performance Measurements state generally that party presence at a place where employees must pass in order to vote is coercive, those case involved continued supervisory presence near the polling area. The Board has implicitly limited the application of *Electric Hose* to "the particular factual situation under consideration, i.e. voters being subjected to their supervisors' scrutiny immediately before entering the polling area."29 and the Board in Performance Measurements agreed that "brief forays into the election area alone may not tend to interfere with the free choice of the employees."30 Since Mr. Monk and the other representatives were present in the Election Zone for only a small percentage of the overall voting time and have no supervisory authority over employees, the instant facts are distinguishable from those of *Electric Hose* and *Performance Measurements*.

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²⁵ 259 NLRB 1118, 1119 (1982), enfd. 703 F.2d 876 (5th Cir. 1983)

²⁶ 251 F.3d 981, 991 (D.C.Cir.2001)

²⁷ 262 NLRB 186 (1982)

²⁸ 148 NLRB 1657 (1964).

²⁹ See Covenant Care of Ohio, Inc. v. N.L.R.B., 180 Fed.App. 576, 582 (C.A.6, 2006).

³⁰ Performance Measurements Co., at 1659.

The Employer adduced no evidence that Mr. Monk or any union representative spoke to or signaled any prospective voter while in the Election Zone or that they attempted in any way to influence voters or even draw attention to their presence. While in the Election Zone, Mr. Monk and the other representatives were more than ten feet away from the auditorium building inside which the polls were located and a much greater distance from the polls themselves. Mr. Monk remained in the Election Zone for a relatively short segment of only the first of six polling periods, and the other union representatives were there for even shorter periods. The Employer has cited no case in which the Board has found that the passive and relatively brief presence of a union agent in a no-electioneering zone constitutes electioneering. Even assuming, as the Employer argues, that Mr. Monk and the other union representatives were engaged in a nonverbal form of electioneering by being present in the Election Zone during part of the voting sessions, there is no evidence they were ever other than unobtrusive and non-interactive. Therefore, the nature and extent of Mr. Monk's and the other union representatives' so-called electioneering were both minimal and noncoercive.

As to Boston Insulated Wire's fourth factor—whether the conduct contravened the instructions of a Board agent—the Employer has not met its burden of showing that Mr. Monk's and the other union representatives' mere presence in the Election Zone contravened the instructions of the Board agent. As noted above, although the Board agent instructed that no electioneering was to occur in the Election Zone, he did not specify what "electioneering" entailed. The Petitioner inferred that the "electioneering" referred to by the Board agent required active conduct—leafleting, speaking to voters, or "anything that would affect" a voter's decision, and Ms. Arnold's notes reflect that the Board agent told the parties they would proceed at their own peril if they had "a representative or supervisor stationed or patrolling to interact or see" a voter on way to polling area, which implies a greater degree of employee contact than an abbreviated and passive presence entails. Although Mr. Monk's presence in the Election Zone was pointed out to the Board agent during the first voting session, the Board agent did not suggest Mr. Monk's presence contravened Board instructions but only remarked that Mr. Monk would remain in the Election Zone "at his own peril," meaning, presumably, that his presence might elicit objections, which it did. Citing the Petitioner's testimony, the Employer asserts that at the end of election-day one voting, the Board agent "admonished Mr. Monk that he was not supposed to be in [the Election Zone]," but there is no evidence the Board agent specifically cautioned Mr. Monk. Rather Mr. Smith's credible testimony is that, at the end of the first day of voting, the Board agent told a gathering of party representatives and observers that "no one was supposed to be in those areas who may have some sort of influence on the election." By the time the Board agent issued that warning, Mr. Monk had ceased to be present in the Election Zone and did not thereafter reappear. In these circumstances, the Employer has not proved that Mr. Monk contravened the Board agent's instructions.

Viewing the record of alleged electioneering as a whole, I find the Union did not fall afoul of factors 3 and 4 of *Boston Insulated Wire* by union representatives' presence in the Election Zone on election-day one. Considering the nature and extent of their presence there, I also find the Employer has failed to prove that the union representatives' conduct had a tendency to interfere with employees' free and uncoerced choice in the election. Accordingly, I recommend Objection 10 be overruled.

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C. Objection 11

During the election, On April 29 and April 30, 2008, in front of the Grace Ford Salvatori Auditorium where bargaining unit members were voting at the time, Union Representatives, including but not limited to Kevin Monk, Letty Marquez, Analisa Alvarez, Karla Villacorta, Lauren Perez Rangel and Samantha Winslow made verbal promises and bribes to employees as they walked past to vote, in violation of the prohibition against electioneering at the polls, and in direct violation of the Board agent, Steve Alduenda's, instruction that the area was a no electioneering zone; a course of conduct calculated to erode support of decertification among unit employees. See *Brinks, Inc,* 331 NLRB 46 (2000); *ITT Auto v. NLRB,* 188 F.3d 375 (6th Cir. 1999). These promises also constitute impermissible attempts to bribe employees on their way to vote. A Union's offer of benefits to potential members during an election campaign is objectionable and is grounds for setting aside an election. *Alyeska Pipeline Service Co.,* 261 NLRB 125 (1982).

Objection 11 differs from Objection 10 in its assertion that Kevin Monk, Letty Marquez, Analisa Alvarez, Karla Villacorta, Lauren Perez Rangel and Samantha Winslow made verbal promises and bribes to employees as they walked past to vote during the election. The Employer presented no evidence to support this assertion. Accordingly, I recommend Objection 11 be overruled.

CONCLUSION

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For the reasons given above, I recommend that the Employer's objections 3, 10, and 11 be overruled. Inasmuch as the Employer has submitted no evidence regarding Employer's objections 1, 2, 4, 5, 6, 7, 8, and 9, I recommend that those objections also be overruled, and that this matter be remanded to the Regional Director for appropriate action.³¹

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Dated, at Washington, DC: April 7, 2009

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Lana H. Parke Administrative Law Judge

Kna V. Starke

 ³¹ Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Recommended Decision. Exceptions must be received by the Board in Washington by April 21, 2009. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this Recommended Decision.